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Department of Mineral Resources & Energy

Attention: Mr Matthews Bantsijang

By Email: era@dmre.gov.za

12 March 2022

Dear Mr Bantsijang

Re: THE GREEN CONNECTION - COMMENT ON ELECTRICITY REGULATION ACT (94/2006): 2nd AMENDMENT BILL (GN1746 of 10 February 2022)

Contents

A. INTRODUCTION

These comments are submitted on behalf of The Green Connection.

The Green Connection is a registered non-governmental organisation, that believes economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. It aims to provide practical support to both the government and non-governmental/civil society sectors, which are an integral part of sustainable development. The Green Connection is an environmental and social justice civil society organisation that promotes sustainable livelihoods and the achievement of environmental rights.

On 10 February 2022 the Minister of Mineral Resources & Energy ('the Minister') published the 2nd Amendment Bill of the Electricity Regulation Act, 2006 (ERA) (hereinafter referred to as the 'proposed ERA Amendment Bill') in the *Gazette* for public comment. Interested and affected parties (I&APs) have been invited to submit comments within 30 days of publication of this notice.

In his State of the Nation Address on 10 February 2022, President Ramaphosa announced that government is implementing fundamental changes to the structure of the electricity sector, and that:

> To regulate all of these reforms, Cabinet yesterday approved amendments to the Electricity Regulation Act, 2006… for public comment.
>
> These far reaching amendments will enable a competitive market for electricity generation and the establishment of an independent state-owned transmission company.[1]

According to a Cabinet statement published on 11 February 2022:

> 4.1. … The proposed amendments broaden the national regulatory framework for the electricity supply industry. They align the country with the international best practice in energy and provide for the functions of a Transmission System Operator,

[1] https://www.gov.za/speeches/president-cyril-ramaphosa-2022-state-nation-address-10-feb-2022-0000

> and for a licensing framework for power generation, transmission, distribution and trading.
>
> 4.2. The proposed amendments form part of several steps the country is taking to reform the electricity sector towards achieving a stable and secure supply of energy. They will also strengthen the performance of the electricity industry and ultimately create a conducive environment towards growing the economy…

While the ERA Amendment Bill does propose significant changes to the national regulatory framework for the electricity supply industry by (among other things) providing for a new transmission system operator and a competitive multi-market structure, it also proposes some significant changes to the regulatory framework that concentrate power in the hands of the Minister of Mineral Resources and Energy and weaken public participation in key decision-making processes. Most significantly in this respect, the amendments will empower the Minister to make section 34 determinations on new electricity generation capacity without having to first obtain NERSA's concurrence, and without any specific requirement for public consultation on a draft section 34 determination.

The Amendment Bill also fails to include any amendments seeking to align the ERA with South Africa's revised nationally determined contributions (NDCS) aimed at limiting the adverse effects of climate change, a significant omission having regard to the global climate emergency and given that South Africa's energy sector is estimated at contributing about 84% percent to the country's overall greenhouse gas (GHG) emissions (60% of which are attributed to the electricity/heat subsector).[2]

B. INTEGRATED RESOURCE PLAN & TRANSMISSION PLANNING

The proposed ERA Amendment Bill includes a revised definition of 'integrated resource plan', providing that it means:

> … an indicative, forward-looking plan for electricity generation, compiled in accordance with section 32A to reflect national policy on electricity planning, which plan specifies the types of energy sources and technologies from which electricity may be generated and indicates the amount of electricity that is to be generated from each of such sources or technologies.

[2] https://www.climatelinks.org/resources/greenhouse-gas-emissions-factsheet-south-africa

The proposed ERA Amendment Bill includes a new Chapter VIA titled 'Planning', which (while containing somewhat confusing numbering) seeks to include a new section 32A dealing with the Integrated Resource Plan (IRP).

In relation the IRP, section 32A[3] the Amendment Bill provides as follows:

(1) The Minister shall, after consultation with the Regulator:

(a) compile the integrated resource plan; and
(b) revise the integrated resource plan at least every three years.

(2) The integrated resource plan shall be developed and revised in accordance with the following process:

(a) The Minister shall, with the assistance of the system operator, engage in electricity supply and demand scenario planning and prepare a document setting out various scenarios in respect of electricity supply and demand and the estimated costs of those scenarios, which the Minister shall publish for public comment in the Gazette;
(b) after considering any comments received in terms of paragraph (a), the Minister shall, with the assistance of the system operator, prepare a draft integrated resource plan, which shall be published for public comment in the Gazette; and
(c) after considering comments received in terms of paragraph (b), the Minister shall finalise the integrated resource plan and publish the plan in the Gazette.

(3) In preparing the integrated resource plan, the Minister must, as far as possible, ensure alignment with the transmission development plan and have regard to all relevant considerations, including:

(a) the location and condition of the current transmission and distribution power systems;
(b) the capacity of those systems;
(c) the extent to which the various electricity supply and demand scenarios will require the development; and
(d) strengthening or upgrading of those systems and the cost of such development, strengthening or upgrading.

(4) The Regulator and any licensee shall timeously provide such assistance and information as the system operator or the Minister may require for the purpose of compiling the integrated resource plan.

[3] Confusingly, the ERA Amendment Bill indicates s32A in bold square brackets (indicating an omission from existing enactments), and s70 is underlined (indicating an insertion in existing enactments).

The ERA Amendment Bill proposes to insert a new section 35(4)(rG) that affords the Minister the discretionary power to make regulations on 'the content of the integrated resource plan'.

Comment:

It is noted that in respect of the IRP the proposed amendments will require the Minister to engage in electricity supply and demand scenario planning, and to prepare a document setting out various scenarios in respect of electricity supply and demand and the estimated costs of those scenarios, which the Minister must publish for public comment in the *Gazette.*

It is noted further that the Minister is also required, after considering any comments received and with the assistance of the system operator, to prepare a draft IRP, which shall be published for public comment in the *Gazette*; and - after considering comments on the draft IRP - to finalise the IRP and publish it in the *Gazette.*

While the ERA Amendment Bill proposes to afford the Minister the discretionary power to make regulations on the content of the IRP, it is a concern that there is no indication of the methodology to be used by the Minister in preparing a draft IRP or in finalising the IRP (save for the requirement for the Minister to electricity supply and demand scenario planning and to estimate the costs of those scenarios).

Previously, the IRP was regulated (somewhat inadequately) through reference to the IRP in the existing ERA read with further provisions contained in the Electricity Regulations on New Generation Capacity.[4] Among other things, the Regulations empowered the Minister to undertake or commission feasibility studies in respect of the new generation capacity requirement,[5] and the considerations and outcomes for a feasibility study included the demonstration of anticipated value for money to be achieved through the new generation capacity requirement.[6] A municipality was empowered to apply to the Minister to procure or

[4] GNR.399 of 4 May 2011 (as amended).
[5] Regulation 5(1).
[6] Regulation 5(2)(c). 'Value for money' is defined in the Regulations as meaning '*that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality,*

buy new generation capacity in accordance with the IRP, and among other things was obliged to conduct and submit a feasibility study.[7] The proposed ERA Amendment Bill does not include similar considerations relating to feasibility studies, and it is unclear whether or to what extent the Electricity Regulations on New Generation Capacity will continue to apply (it seems likely that the Regulations will at the very least need to be substantively amended to align with the proposed amendments to the ERA).

Notwithstanding the above, in practice integrated resource planning was conducted to generate least-cost electricity generation and supply scenarios. No mention is made in the proposed amendments of least-cost electricity generation or value for money as requirements for consideration, and as mentioned above no methodology for developing the IRP is included. No mention is made of other relevant considerations that in the Green Connection's view should inform the IRP and choices made relating to types of energy sources and technologies from which electricity may be generated (and the amount of electricity that is to be generated from each of such sources or technologies), including (but not limited to): climate change considerations; and any integrated energy plan (IEP) developed in accordance with the provisions of section 6 of the National Energy Act, 2008 (NEA) (which, while enacted but not yet brought into effect, is intended by Parliament to serve as a guide for energy infrastructure investments – see further paragraph c.4. and C.5. for further discussion relation to NEA and IEP).[8]

On the face of it, the proposed amendments appear to afford the Minister wide power to compile (and revise) an IRP in the absence of a specified methodology, and without being required to have consideration to other critical relevant considerations such as least-cost electricity generation and supply, value for money or environmental considerations (including the impact choices regarding different energy sources and technologies will have on South Africa's ability to meet its revised Nationally Determined Contributions).[9]

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quantity, risk transfer or a combination thereof, but also where applicable to the Government's policies in support of renewable energy'.

[7] Regulation 5(3).

[8] NEA, s6(6)(a).

[9] https://www.dffe.gov.za/sites/default/files/docs/southafricasINDCupdated2021sept.pdf, at p15.

It is noted that s32A(3) of the proposed ERA Amendment Bill requires the Minister to, as far as possible, ensure alignment with the transmission development plan and have regard to all relevant considerations, including: the location and condition of the current transmission and distribution power systems; the capacity of those systems; the extent to which the various electricity supply and demand scenarios will require the development; and strengthening or upgrading of those systems and the cost of such development, strengthening or upgrading. This section is poorly drafted, and it is unclear whether the requirement for the Minister to take have regard to 'all relevant considerations' is limited to the transmission-related considerations specifically listed as included (and thus exclude other relevant consideration, such as least-cost, value for money and the potential impacts of various generation options on South Africa's climate change commitments). If the intention is that the Minister in compiling and subsequently revising the IRP must take into account 'all relevant considerations' that are <u>not</u> limited to the transmission-related inclusions, the Green Connection submits that the subsection should at the very least be reworded, for example as follows:

> 3) In preparing the integrated resource plan, the Minister must have regard to all relevant considerations, and must, as far as possible, ensure alignment with the transmission development plan, including:
>
> (a) the location and condition of the current transmission and distribution power systems;
> (b) the capacity of those systems;
> (c) the extent to which the various electricity supply and demand scenarios will require the development and strengthening or upgrading of those systems; and the cost of such development, strengthening or upgrading.

The Green Connection submits that the absence of specified IRP methodology, the confusing formulation of subsection (3), and the absence of any specific requirement to take into account relevant considerations - such as least-cost electricity generation and supply, value for money or environmental considerations (such as climate change) – risks undermining section 2(a)(b) of the current ERA, which seeks to ensure that the interests and needs of

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present and future electricity customers and end-users are safeguarded and met having regard to the governance, efficiency, effectiveness and long-term sustainability of the electrical supply industry within the broader context of economic regulation in the Republic. The Green Connection is also of the view that this falls short of the Constitutional imperative to protect the environment from the adverse climate change of certain energy sources and technologies, for the benefit of present and future generations, through reasonable legislative measures that (among other things) prevent pollution and secure ecologically sustainable development and use of natural resources while promoting justifiable social and economic development.[10]

The Green Connection respectfully submits that the proposed ERA Amendment Bill should:

- Include the methodology to be used by the Minister in compiling an IRP;
- Specify relevant considerations that should be taken into account (such as least-cost electricity generation and supply, value for money, environmental considerations such as climate change); and
- That a clause should be included requiring the Minister to ensure that the IRP is aligned with and guided by any IEP developed in terms of section 6 of the National Energy Act.

C. SECTION 34 DETERMINATIONS

C.1. Minister empowered to make determinations regarding new electricity capacity 'after consultation with' NERSA and the Minister of Finance

Under subsection 34(1) of the current ERA, the Minister is empowered, in consultation with the Regulator, to make determinations regarding the need for new electricity generation capacity to ensure the continued uninterrupted supply of electricity.

The ERA Amendment Bill seeks to substitute subsection 34(1) with the following:

> (1) The Minister may, by notice in the Gazette, after consultation with the Regulator and the Minister of Finance, make a determination that additional electricity or new generation capacity is needed to ensure the optimal supply of electricity;

[10] Constitution of the Republic of South Africa, 1996 – section 24.

The proposed ERA Amendment Bill proposes the following definition for 'new generation capacity'[11]:

> **'new generation capacity'** means additional electricity capacity, including capacity derived from new generation facilities, an expansion of existing facilities or existing facilities not previously connected to the national transmission power system or an interconnected distribution power system, other than:
>
> (a) the capacity of generation facilities for own use;
> (b) the capacity of generation facilities that supply electricity to end users pursuant to direct supply agreements[12];
> (c) the capacity of generation facilities referred to in item 1 of Schedule II; and
> (d) the capacity of generation facilities for export, which have been approved by the Minister in accordance with section 13A(1)(c);

Comment:

The proposed ERA Amendment Bill seeks to introduce significant changes in respect of Ministerial determinations relating to new electricity generation capacity (and the procurement thereof).

Under the existing ERA, the Minister is empowered by section 34 to make determinations relating to the need for new electricity generation capacity to ensure the 'uninterrupted

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[11] The existing ERA does not include a definition for 'new generation capacity', but the Electricity Regulations on New Generation Capacity made under the ERA provides the following definition:

> *"new generation capacity" means electricity or electricity capacity sold or made available, or generation capacity connected, to the national transmission power system or an interconnected distribution power system, pursuant to a determination in terms of section 34 (1) of the Act, which is derived from:*
> *(a) new generation facilities;*
> *(b) an expansion of existing generation facilities;*
> *(c) existing generation facilities not previously supplying electricity to the national transmission power system or an interconnected distribution power system;*
> *(d) existing generation facilities through an extension of any existing agreement for the purchase of electricity capacity or electricity for an additional supply period to be defined in the power purchase agreement, or through entering into a new power purchase agreement for a supply period to be defined in terms of such new power purchase agreement; or*
> *(e) demand side reduction measures, including aggregation, management of demand side reduction, or energy efficiency measures;"*

[12] The ERA Amendment Bill includes a proposed definition of the term **'direct supply agreement'**, namely '*an agreement for the sale of electricity between a generation licensee, acting in its capacity as such, and a customer, whether such electricity is supplied directly or through a transmission power system or a distribution power system, provided that the customer is not a generator, transmitter, distributor, system operator or trader*'.

supply of electricity', and to determine the types of energy sources from which the electricity must be generated (and the percentage that must be generated from such sources). However, the Minister is required to make such determinations 'in consultation with' NERSA. The practical effect of this is that the Minister must obtain the 'agreement' or 'concurrence' of NERSA in order to make such a determination. NERSA is in turn required by section 10(d) of the National Energy Regulator Act, 2004 to take its decision within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to NERSA. NERSA thus currently provides the public with an opportunity to make representations regarding section 34 determinations proposed by the Minister. This provides an important 'check and balance' against the Minister's power to make section 34 determinations.

Should this proposed amendment be promulgated, the Minister will no longer be required to seek the 'agreement' or 'concurrence' of NERSA in relation to a section 34 determination. It follows that NERSA would in turn not be making any decision relating to a Ministerial section 34 determination, and as a consequence would not be required to conduct a public participation process as required by s10(d) of the National Energy Regulator Act, 2004[13]).

It is also notable that the proposed amendment does not specify that the Minister should engage in any public participation relating to making section 34 determinations that new generation capacity is needed. While the proposed amendments require the Minister to publish a determination in the *Gazette*, it does not provide for public comment on any such section 34 determinations (unless the Minister seeks to deviate from the IRP, as discussed in paragraph C.2. below).

In light of the above, the Green Connection respectfully submits that:

- The proposed amendment to section 34(1) be revised to empower the Minister to

[13] Act 40 of 2004, as amended. Section 10(1)(d) provides that every decision of the Energy Regulator must be in writing and must be taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator.

make determinations relating to new generation capacity 'in consultation with' NERSA and 'after consultation with' the Minister of Finance; and

- Specific provision should made for public comment / consultation on any draft section 34(1) determination proposed by the Minister.

C.2. s34 Determinations and the IRP

It is noted that section 34 of the ERA Amendment Bill provides as follows regarding the IRP and deviations from the IRP or TDP:

> (7) In making a determination in terms of this section, the Minister:
>
> (a) must have regard to the content of the integrated resource plan or the transmission development plan, as the case may be; and
> (b) deviate from the integrated resource plan or transmission development plan in an emergency or if it is necessary to do so in the national interest.
>
> (8) Prior to deviating from the integrated resource plan or transmission development plan as envisaged in subsection (7)(b), the Minister **mus**t publish a notice in the Gazette, inviting the public to comment on the proposed deviation.
>
> (9) If it is reasonable and justifiable in the circumstances, the Minister may depart from the provisions of subsection (8).

Comment:

While the proposed amendments include a mandatory requirement for the Minister to 'have regard to' the content of the IRP, the proposed amendment does not oblige the Minister to be 'bound by the IRP' in making a determination, nor is there any specific requirement for the Minister to invite public comment on a proposed section 34 determination.

In addition (and while the word 'may' appears to be missing from subsection 7(b)), the intention appears to be to empower the Minister to deviate from the IRP in 'in the event of an emergency' or 'if it is necessary to do so in the national interest'. No criteria are specified for what may constitute such an 'emergency' or what may be 'in the national interest'. It is also noted that while the Minister is obliged to invite public comment prior to deviating from the IRP or TDP, subsection 9 empowers the Minister to not invite public comment 'if it is reasonable and justifiable in the circumstances'. Again no criteria are specified for what may

be ‘reasonable and justifiable in the circumstances’.

Read together, these proposed amendments again concentrate power in the hands of the Minister, who is only required to ‘have regard to’ the IRP (which is compiled and finalized by the Minister, albeit after public comment and consideration of such comments) but may deviate from the IRP or TDP ‘in an emergency or if it is in the national interest to do so’. And while the Minister is required to invite public comment prior to any deviation, he is also empowered to side-step such public consultation ‘if it is reasonable and justifiable in the circumstances’. The Green Connection is of the view that this provision is in conflict with the foundational constitutional principles of accountability and openness, as well as the constitutional right to procedurally fair administrative decision-making.

In light of the above, the Green Connection respectfully submits that:

- Proposed section 34(7)(b) be corrected by inserting the missing word, mostly likely the word ‘may’;
- Proposed section 34(8) be revised to specify criteria for what may constitute an ‘emergency’ or what may be ‘in the national interest’; and
- Proposed section 34(9) be removed.

C.3. Procurement

Section 34(2) of the proposed ERA Amendment Bill seeks to require the Minister when making a section 34 determination to include provisions dealing with (among other things):

> (e) where applicable, the identity of the person responsible for preparing and conducting the procurement process for the acquisition of the electricity thus produced, which may be a person different from the buyer of such electricity;
>
> (f) where applicable, the procurement process to be conducted for acquisition of the electricity thus produced, which may include:
>
> (i) a detailed stipulation of the procurement process in the determination;
> (ii) the stipulation in the determination of general principles governing the procurement process with which the procurement process determined by the person designated as the procurer in accordance with paragraph (e) must comply; or

(iii) a provision stipulating that the person designated as the procurer in accordance with paragraph (e) will be responsible for determining the procurement process

Comment:

With regard to procurement, section 34(1)(e)(i) of the existing ERA empowers the Minister to determine that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost effective. This formulation aligns with s217 of the SA Constitution.[14]

Section 34(2)(e) and (f) of the proposed ERA Amendment Bill requires the Minister when making a determination to include provisions dealing with the procurement process to be followed, and indicates that this may include:

- a detailed stipulation of the procurement process in the determination;
- the stipulation of general principles governing the procurement process which the procurement process determined by the designated procurer must comply with; or
- a provision stipulating that the designated procurer will be responsible for determining the procurement process.

The last option is of particular concern given that the gazetted determination would not specify the detailed procurement process or even the general principles that apply. This would likely result in less transparency as the designated procurer would be free to determine the procurement process. While such a process could in theory be challenged in court if it did not comply with s217 of the SA Constitution, a lack of transparency would likely make it very difficult for civil society to obtain details of the procurement process, and play its legitimate 'watchdog' role. Procurement processes determined by the procurer outside of the glare of

[14] Constitution of the Republic of South Africa, 1996. s217(1) provides that which provides that '*when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*'.

public scrutiny are also more susceptible to manipulation and corruption, and are inconsistent with the foundational constitutional principles of accountability and openness.[15]

In light of the above, the Green Connection submits that proposed section 24(2)(f)(iii) should be omitted from the proposed amendments.

C.4. New electricity infrastructure

The proposed ERA Amendment Bill seeks amend section 34 to include a subsection (3), which provides as follows:

> The Minister may, by notice in the Gazette, after consultation with the Regulator and the Minister of Finance, make a determination that new electricity infrastructure is needed to ensure the optimal supply of electricity.

A new subsection (13) is also proposed which provides a definition of 'electricity infrastructure':

> For [the] purposes of this section, "electricity infrastructure" means transmission facilities (and distribution facilities) or any other electricity infrastructure designated by the Minister by notice in the Gazette for this purpose, excluding electricity generation facilities.

Comment:

This proposed new power to make determinations in respect of electricity infrastructure widens the Minister's powers. The Minister will be empowered not only to make determinations in respect of new [additional] electricity generation capacity, but will also be empowered to make determinations in respect of new electricity infrastructure to ensure the 'optimal supply of electricity'.

The term 'optimal supply of electricity' is not used or defined in the current ERA, nor is it defined in the proposed ERA Amendment Bill. The word 'optimal' is used but not defined in

[15] Constitution of the Republic of South Africa, section 1.

the objects to the National Energy Act[16] (NEA). Section 2 provides that the objects of NEA are to (among other things):

> provide for optimal supply, transformation, transportation, storage and demand of energy that are planned, organised and implemented in accordance with a balanced consideration of security of supply, economics, consumer protection and a sustainable development;

When used in NEA in the context of energy supply, transportation, storage and demand, the concept is balanced by reference to the planning, organisation and implementation of same being in accordance with a balanced consideration of supply, economics, consumer protection and sustainable development.

It is also noted that, as with new generation capacity determinations, the proposed amendments will empower the Minister to make the relevant determination 'after consultation with' NERSA and the Minister of Finance, and will not be required to obtain NERSA's concurrence on any such determination.

In light of the above, the Green Connection respectfully submits that:

- The term 'optimal supply of electricity' be clearly defined in the proposed ERA Amendment Bill;
- Section 34(3) be revised to include a balance of considerations such as security of supply, economics, consumer protection and sustainable development; and
- The power afforded to the Minister to make determinations in relation to new electricity infrastructure be revised to require the Minister to make the relevant determination 'in consultation with' NERSA and 'after consultation with' the Minister of Finance.

C.5. Energy Infrastructure

The proposed ERA Amendment Bill seeks amend section 34 to include the following subsections:

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[16] 34 of 2008.

(14) A determination contemplated in this section may establish an energy infrastructure project which includes not only new generation capacity and new electricity infrastructure but also other interconnected or related infrastructure, installations, buildings, structures, facilities, systems, services or processes, including gas infrastructure, in which case, the provisions of subsections (4) and (10) shall, with the necessary changes, apply to such infrastructure, installations, buildings, structures, facilities, systems, services or processes.

(15) The Regulator must, in respect of an energy infrastructure project contemplated in subsection (14), exercise its powers and perform its functions under this Act and any other statute in a coordinated and integrated manner.

(16) The Minister may, in writing, direct the Regulator to conclude a memorandum of understanding with any other regulator in order to facilitate the coordinated establishment of an energy infrastructure project contemplated in subsection (14).

Comment:

Having regard to these proposed amendments, the Minister will be empowered not only to make determinations in respect of new [additional] electricity generation capacity and new electricity infrastructure, but will also be empowered through a section 34 determination to establish an energy infrastructure project, with specific reference made to this including gas infrastructure. The Minister's powers will be further widened by proposed new section 33:

(1) The Minister may make regulations, notices and schedules regarding:
   (a) any matter relating to generation, distribution or transmission that is necessary to ensure security of energy; and
   (b) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe in order to ensure security of energy**.**

It is of concern to the Green Connection that these proposed amendments relating to energy infrastructure projects are being proposed in the absence of an Integrated Energy Plan (IEP) developed (and annually reviewed) by the Minister in terms of section 6 of the NEA (which section has not yet been brought into operation). The NEA is designed to regulate various aspects relating to energy, including energy infrastructure, in balance with other considerations including environmental considerations. For example, in terms of the Preamble to the NEA, the Act is intended (among other things):

To ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and

> poverty alleviation, taking into account environmental management requirements and interactions amongst economic sectors; to provide for energy planning, increased generation and consumption of renewable energies, contingency energy supply, holding of strategic energy feedstocks and carriers, adequate investment in, appropriate upkeep and access to energy infrastructure…

Once made operational, section 6 of NEA would require the Minister to develop (and on an annual basis revise) an IEP, which would in turn be required to deal with issues relating to the supply, transformation, transport, storage of and demand for energy in a way that accounts for (among other things): security of supply; economically available energy resources; affordability; the environment; and international commitments.[17] The IEP is also intended to serve as a guide for energy infrastructure investments.[18]

It is of further concern to the Green Connection that the proposed amendments seek to extend the Ministerial determination-making powers to establish energy infrastructure projects, including gas infrastructure, in the absence of requirements to (among other things): ensure affordability; protect current and future generations and the environment against the adverse impacts associated with certain energy choices (such as the increased use of fossil fuels, including gas); to ensure that such choices are aligned with international commitments (such as climate change commitments); and to ensure that the IRP is aligned with and guided by any IEP developed in accordance with section 6 of the NEA.

In light of the above, the Green Connection respectfully submits that sections 34(14) to 34(16) should be removed from the proposed ERA Amendment Bill.

C.6. NERSA bound by Minister's determination

It is noted that the proposed ERA Amendment Bill seeks to substitute existing section 34(3) with the following:

> (11) The Regulator, in exercising its powers and performing its functions under this Act is bound by any determination made by the Minister in terms of subsection (1) or (3).

[17] NEA, s6(2).
[18] NEA, s6(6)(a).

While this proposed subsection is not fundamentally different from previous section 34(3), it is a concern that NERSA 'is bound by' any determination made by the Minister given that the proposed amendments will require the Minister to consult with (rather than obtain the concurrence of) NERSA regarding any determination relation to additional electricity generation capacity, electricity infrastructure or energy infrastructure. This again has the effect of concentrating power in the hands of the Minister, and fetters the discretion of the NERSA in exercising its powers and functions under the ERA (such as its power to issue electricity generation licenses).

The Green Connection submits that the Regulator should not be fettered in the exercise of its discretion as Regulator, and that proposed section 34(11) should be revised to state that the regulator will 'have regard to' rather than 'is bound by' any determination made by the Minister.

D. PRE-APPROVAL OF TARRIFS AND LICENCE CONDITIONS

The proposed ERA Amendment Bill includes a new section 14A dealing with pre-approval of tariffs and licence conditions:

> (1) The Minister may, either prior to or after the relevant section 34 determination and in order to facilitate the procurement of electricity or new generation capacity through an IPP procurement process, in writing request the Regulator, prior to the commencement of such process and within a reasonable time period specified by the Minister in the request, to:
>
> (a) determine licence conditions that shall apply to the successful participant or participants in that IPP procurement process; and
> (b) determine a tariff, a maximum tariff or a guideline tariff for a particular generation technology, that shall apply in respect of electricity generated by means of that technology pursuant to that IPP procurement process.
>
> (2) The determination referred to in subsection (1)(b) may include conditions to which the tariff, maximum tariff or guideline tariff is subject.
>
> (3) Subject to conditions determined in accordance with subsection (2), if the Regulator has, in terms of subsection (1)(b), determined:

(a) a tariff, the Regulator shall impose that tariff as a condition of any generation licence granted in respect of the relevant technology pursuant to the relevant IPP procurement process;
(b) a maximum tariff, the Regulator shall, in granting a generation licence in respect of the relevant technology pursuant to the relevant IPP procurement process, approve any tariff agreed between the independent power producer and the buyer that does not exceed that maximum tariff; and
(c) a guideline tariff, the Regulator shall have regard to the guideline tariff in setting or approving the tariffs in a generation licence granted in respect of the relevant technology pursuant to the relevant IPP procurement process.

(4) The provisions of subsections (1), (2) and (3) apply, with the necessary changes, to the procurement of electricity infrastructure through an electricity infrastructure procurement process.

The proposed ERA Amendment Bill then seeks to introduce a new section 15(1) and (1A) relating to tariff principles:

(1)(a) The Regulator, in setting and approving tariffs as contemplated in sections 14 or 14A:

(a) must enable an efficient licensee to recover the full cost of the licensed activity;
(b) must allow for a reasonable return commensurate with the risk of the licensed activity;
(c) may provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;
(d) must avoid undue discrimination between customer categories;
(e) may permit the cross-subsidy of tariffs to certain classes of customers; and
(f) may have regard to the need to ensure security of supply and diversity of supply and to promote renewable energy.

(1A) Tariff determinations must take into account all planned projects reflected in the integrated resource plan and the transmission development plan insofar as these projects will impact on the costs of the licensee for the period during which the tariff will apply.

(1B) In the case of vertically integrated licensees, the Regulator must set or approve separate tariffs for each of the licensed activities listed in the sub-paragraphs of section 4(a)(i).

(2) A licensee may not charge a customer any tariff other than the tariff set or approved by the Regulator as, or in accordance with, a licence condition."

…
(4) Notwithstanding subsection (2), a generation licensee may charge a customer a tariff which has not been set or approved by the Regulator where such tariff is charged pursuant to a direct supply agreement.

Comment:

The proposed ERA Amendment Bill includes a new section 14A which includes a discretionary power enabling the Minister to request NERSA - either prior to or after a section 34 determination and 'in order to facilitate the procurement of electricity or new generation capacity through an IPP process' - to determine license conditions that would apply to the successful IPP bidder/s, as well as to determine a tariff, maximum tariff or a guideline tariff for a particular generation technology. These provisions also apply to the procurement of electricity infrastructure.

The proposed amendments also seek to introduce provisions stipulating mandatory and discretionary requirements relating to NERSA setting and approving tariffs. Among other things, these include the requirement for NERSA to allow a reasonable return commensurate with the risk of the licensed activity, while also having regard to the need to ensure security of supply and diversity of supply, and to promote renewable energy.

While the promotion of renewable energy is laudable, the pre-approval of tariffs raises questions relating to least-cost electricity and electricity / energy infrastructure. Experience has shown that competitive bidding in successive rounds of procurement of electricity from renewable energy IPPs has driven down the costs of supply from these sources significantly. The pre-approval of tariffs for particular technologies could, on the face of it, potentially benefit more costly electricity generation technologies (such as nuclear or liquified natural gas) which also require significant electricity and energy infrastructure development.

The Green Connection submits that, in addition to distorting the potential benefits of competitive bidding between different technology options, this proposed amendment undermines section 2(a)(b) of the current ERA, which seeks to ensure that the interests and needs of present and future electricity customers and end-users are safeguarded and met (having regard to the governance, efficiency, effectiveness and long-term sustainability of the electrical supply industry within the broader context of economic regulation in the Republic). By favouring proponents of higher risk technology options, this proposed amendment also

conflicts with section 2(g) of the current ERA (which seeks to facilitate a fair balance between the interests of customers and end-users, licensees, investors in the electricity supply industry and the public).

The Green Connection is also concerned that the obligation imposed on NERSA in setting and approving tariffs in terms of section 15(1)(b) – which requires it to allow for a reasonable return commensurate with the risk of the licensed activity - unreasonably fetters NERSA's discretion as Regulator. The 'provision of a reasonable return commensurate with the risk of the licensed activity' also seems to create an enabling regulatory environment for activities that carry more financial (and other) risk, including activities that require significant infrastructure development. The Green Connection submits that this provision is also in conflict with sections 2(b) and 2(g) of the current ERA.

Additionally, the Green Connection is concerned that no provision has been made for transparency or public-participation in relation to the determination of license conditions or the setting and approval of tariffs.

In light of the above, the Green Connection respectfully submits that:

- Provisions relating to the prior approval of tariffs be removed from the ERA Amendment Bill;
- The reference in proposed section 15(1)(b) to 'must' be replaced with 'may' to afford NERSA appropriate discretion to ensure that returns are commensurate with the public interest and are not prejudicial to end-users (and in particular vulnerable and historically disadvantaged communities who are most affected by increases in the price of electricity);
- The reference in proposed section 15(1)(b) to 'provision of a reasonable return commensurate with the risk of the licensed activity' be amended to de-link it with the risk of the licensed activity; and

- The draft ERA Amendment Bill be revised to make provision for transparency and public participation in relation to the determination of license conditions as well as in the setting and approval of tariffs.

E. AD SERIATUM COMMENTS

E.1. Section 10(e) – Plans and ability to comply

It is noted that the proposed ERA Amendment Bill does not seek to amend section 10(1)(e) of the existing ERA, which provides that an application for a license for activities described in proposed amended section 7(1)[19] must include:

> The plans and the ability of the applicant to comply with applicable labour, health, safety and environmental legislation, subordinate legislation and other such requirements as may be applicable.

The Green Connection submits that section 10(1)(e) should be amended to stipulate that the application must include evidence of compliance with applicable environmental legislation, subordinate legislation and other such requirements as may be applicable, including but not limited to environmental authorisation requirements in terms of NEMA.

E.2. Section 10(3) – Confidential treatment of information

It is noted that the proposed ERA Amendment Bill seeks to include a new subsection (3), namely:

> The applicant may request confidential treatment of commercially sensitive information contained in an application and, subject to the concurrence of the Regulator, such information may be withheld from publicly available copies of the application.

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[19] Section 7(1) of the proposed ERA Amendment Bill provides as follows:

No person may, without [a] the appropriate licence issued by the Regulator in accordance with this Act or unless authorised in terms of a licence condition contemplated in section 14(1)(t):

(a) construct or operate any generation facility;
(b) construct, or manage any transmission power system;
(c) construct or operate any distribution power system;
(d) import any electricity;
(e) export any electricity; or
(f) engage in system operation.

It is trite that procedurally fair administrative decision-making requires the provision of sufficient information to interested and affected parties to enable meaningful public participation in the decision-making process. The Green Connection is concerned that the formulation of proposed section 10(3) is too wide, and could be used to withhold relevant information that interested and affected persons have a legitimate right to access.

The Green Connection submits that this proposed insertion should be removed, alternatively should be amended to provide that access to information contained in the application is subject to the provisions of the Promotion of Access to Information Act, 2000.

E.3. Section 11 – Publication of notification of license application

It is noted that the proposed ERA Amendment Bill seeks to make it mandatory for the Regulator to, in writing, direct the applicant to publish notice of the license application.

It is further noted that the proposed ERA Amendment Bill does not seek to amend the manner in which the notice is to be published (i.e. 'in appropriate newspapers or other appropriate media circulating in the area of the proposed activity in at least two official languages'[20]). The proposed ERA Amendment Bill does however seek to amend subsection (3) by stipulating that the advertisement contemplated must be published for such period or in such number of issues of a newspaper as the Regular may specify in the direction referred to in subsection (1).

The Green Connection submits that section 11 should be amended to provide for meaningful consultation with interested and affected parties and the public, and that notification of the opportunity to comment on or object to a license application should be required to be published in appropriate newspapers circulating nationally as well as in the area of the proposed activity. Where potentially affected persons include vulnerable and historically disadvantaged communities, alternative means of giving notice should also be required (such as posting local notices, utilizing local radio stations and holding community consultation

[20] Section 11(1).

meetings), and that the prior informed consent of such communities should be sought and obtained. Given that electricity generation has significant environmental implications (relating to the energy source and technology under consideration), the Green Connection submits further that the requirement for NERSA to have regard to the NEMA section 2 environmental management principles should be incorporated into the ERA Amendment Bill by reference.

The Green Connection submits further that the notification requirements should also include an obligation to notify interested and affected parties of the decision and the reasons therefore, as well as any remedies they might have if dissatisfied with the decision. Such notification should be in the same manner as directed in relation to giving notification of the application as suggested by the Green Connection above.

E.4. Section 14(1)(t) – Sub-contracting of licensed functions

Section 13(g) of the proposed ERA Amendment Bill seeks to substitute section 14(1)(t) of the ERA with a new subsection that would (if enacted) empower the Regulator to include a license condition:

> … allowing the licensee to sub-contract the performance of the licensed functions, including allowing for the licensee to sub-contract the construction, maintenance and operation of the generation facility, transmission power system or distribution power system.

This clause is a cause for concern, as it effectively means that a company or entity could apply for and obtain a license to operate a generation facility, transmission power system or distribution system, and then sub-contract the operation to a third party. Such an arrangement could lend itself to corruption, with companies with no or insufficient track record or experience operating generation facilities, transmission power systems or distribution power systems applying for and obtaining licenses, and in turn sub-contracting the operation thereof to a third party or parties. While this can have implications of accountability, experience with state capture has shown how costs can be significantly inflated when such ‘intermediary’ parties (often linked to politically exposed persons) secure

tenders and in turn sub-contract out the performance thereof. Such arrangement are not to the benefit of current and future generations of electricity consumers.

The Green Connection submits that the Regulator should not be empowered to include a license condition allowing the licensee to subcontract the operation of a generation facility, transmission power system or distribution system to a third party, and that proposed section 14(1)(t) should be removed from the ERA Amendment Bill.

E.5. Section 19 – Power to suspend or revoke licenses

It is noted that the proposed ERA Amendment Bill seeks to substitute the existing section 19 of the ERA, which currently empowers NERSA to apply to the High Court for an order suspending or revoking a license if there is any ground justifying same. The proposed amendment seeks to add the wording 'such as a failure to carry out the activities of the activities for which the license was granted or material non-compliance with the conditions of the license'.

While this proposed amendment is not materially different to the corresponding provision in the existing ERA, it is unclear to the Green Connection why NERSA would be required to seek a High Court order to suspend or revoke a license, especially in circumstances elaborated upon in the proposed amendment. It is difficult to see how NERSA can effectively perform its function to enforce performance and compliance (including the taking of necessary steps in the case of non-performance) as the Regulator in such circumstances.

The Green Connection submits that the ERA should rather be amended to empower NERSA to suspend or revoke licenses in such circumstances, following a procedurally fair decision-making process. It would then be incumbent upon an aggrieved licensee whose license has been suspended or revoked, and whose has exhausted any internal remedy, to apply to the High Court for a review of same.

E.6. Section 21(3A) - Discrimination

The proposed ERA Amendment Bill also seeks to insert a new subsection (3A) in section 21

dealing with powers of licensees:

> The system operator shall not discriminate between different generators or customers in relation to dispatching, except for objectively justifiable and identifiable reasons.

What constitutes 'discrimination' in this context is unclear, while what constitutes 'objectively justifiable and identifiable reasons' is not specified or elaborated upon in the ERA Amendment Bill.

The Green Connection submits that discrimination should not be permitted, alternatively the proposed Amendment Bill should clearly indicate what constitutes 'discrimination' in this context as well as what constitutes 'objectively justifiable and identifiable reasons'.

E.7. Deletion of section 30 of current ERA

The proposed ERA Amendment Bill seeks to delete section 31 of the ERA, the relevant portion of which currently specifies that section 10(3) of the National Energy Regulator Act (NERA) applies to every decision taken by the Regulator in terms of the ERA (except where the ERA provides).

Section 10(3) of NERA stipulates that any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulatory in accordance with the Promotion of Administrative Justice Act, 2000.

It is unclear why it is proposed that this provision be deleted. Should this be an attempt to limit the rights of the public to take decisions made by the Regulator on judicial review, it is submitted that it would be unconstitutional (and in breach of the Constitutional right to procedurally fair administrative action).

The Green Connection submits that existing section 31 of the ERA should be retained.

E.8. Section 33(4) – disclosure of information

At paragraph 32(b) of the ERA Amendment Bill, a new subsection 33(4) is inserted which provides as follows:

> No information obtained by the Regulator in terms of this Act which is of a non-generic, confidential, personal, commercially sensitive or proprietary nature may be made public or otherwise disclosed to any person without the consent of the person to whom that information relates, except in terms of an order of the High Court.

The Green Connection is of the view that this proposed clause is too wide, on the face of it appears to be in conflict with the constitutional right of access to information, and will have the effect of undermining public participation with regard to various decision-making processes.

National legislation has been enacted to give effect to this right, and which also includes provisions limiting the disclosure of specified information.

The Green Connection submits that this subsection should be replaced by a provision stipulating that 'information provided to the Minister or the Department in terms of this Act must be made available by the Minister subject to the provisions of the Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2013'.

E.9. Schedule 2

It is noted that the proposed ERA Amendment Bill indicates that Schedule 2 of the principal Act will be amended.

However, the proposed Schedule 2 is identical to the Schedule 2 already included (and previously amended) in the current ERA.

F. INCORRECT REFERENCES

The draft ERA Amendment Bill is replete with errors and incorrect referencing. Some of these errors include (but are not limited to) the following:

- Paragraph 12 of the proposed ERA Amendment Bill indicates that a new section 13A will be inserted. Proposed section 13A has not been included in the ERA Amendment Bill.

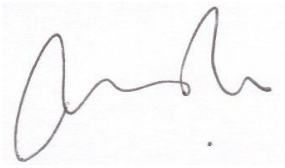
- A number of references to new sections of the ERA are confusing and appear to be in error.

  For example, Chapter VF (page 52) refers to an 'Amendment of section _[31] 70 of the Act 2006' and 'Section [31] 70 of the principal Act is hereby amended by the substitution of…'. There is no section 70 in the proposed ERA Amendment Bill (or in the existing ERA).

  By way of further example, at paragraph 33 of the proposed ERA Amendment Bill, it is indicated that section 34 of the principal Act is to be amended 'by the substitution of section [34] for 71 subsection 1 of…' There is no '71 subsection 1' in the proposed ERA Amendment Bill.

- The proposed ERA Amendment Bill inserts a new section 33 under the heading 'General Provisions' (Chapter VE, p50). Confusingly, the proposed ERA Amendment Bill later seeks to amend section 33 of the principal Act (p56, paragraph 32), and even more confusingly refers in sub-paragraph (a) to the 'substitution of section [33] for subsection 71'.

Yours sincerely



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Adrian Leonard Pole